

Appeal from a decision of the Alaska State Office, Bureau of Land Management, approving the conveyance of 327.5 acres of the Bender Mountain parcel to Cook Inlet Region, Inc., pursuant to its selection application (F-85569) filed under subsection 12(c) of the Alaska Native Claims Settlement Act of 1971, P.L. 92-203, 85 Stat. 688, 701 (Dec. 18, 1971), and P.L. 94-204, § 12(b), 89 Stat. 1145, 1151, as amended.

Appeal dismissed.

1. Administrative Procedure: Standing--Alaska Native Claims Settlement Act: Administrative Procedure: Decision to Issue Conveyance--Alaska Native Claims Settlement Act: Appeals: Standing--Rules of Practice: Appeals: Standing to Appeal

A party filing a notice of appeal of a decision to convey land under the Alaska Native Claims Settlement Act is required to file a statement of standing within 30 days of filing a notice of appeal. If a statement of standing is not filed, the appeal is subject to summary dismissal. Discretion to dismiss an appeal for failure to timely file a statement of standing will not be exercised when the property interest on which a party claims standing is identified in the statement of reasons and there is no showing that the procedural deficiency has prejudiced an adverse party.

2. Alaska Native Claims Settlement Act: Administrative Procedure: Decision to Issue Conveyance--Alaska Native Claims Settlement Act: Appeals: Standing--Alaska Native Claims Settlement Act: Conveyances: Easements--Alaska Native Claims Settlement Act: Easements: Decision to Reserve--Rules of Practice: Appeals: Standing to Appeal

In relation to a decision to convey land under sec. 12 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611 (1988), the phrase "land affected by the decision" in 43 CFR 4.410(b) refers to the land to be conveyed. Land which is near or adjacent to the land to be conveyed is not "land affected by the decision." Because the reason for reserving a public easement under subsec. 17(b)(1) of the Alaska Native Claims Settlement Act is to provide access to lands not conveyed, a different rule applies to decisions concerning easements.

3. Practice Before the Department: Generally

Practice before the Board of Land Appeals is controlled by 43 CFR 1.3. An appeal brought by a person who does not qualify to practice under one of the provisions is subject to dismissal. The person filing an appeal has the responsibility of showing that he is qualified under the regulation.

APPEARANCES: Robert A. Perkins, Fairbanks, Alaska, pro se; Mark Rindner, Esq., Anchorage, Alaska, for Cook Inlet Region, Inc.; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Robert A. Perkins has appealed, on behalf of himself, the Skyline Ridge Park Committee, and four individuals a decision of the Alaska State Office, Bureau of Land Management (BLM), dated September 27, 1988, approving the conveyance of 327.5 acres of an 810-acre tract known as the Bender Mountain parcel to Cook Inlet Region, Inc. (CIRI), pursuant to its selection application (F-85569) filed under subsection 12(c) of the Alaska Native Claims Settlement Act of 1971 (ANCSA), P.L. 92-203, 85 Stat. 688, 701 (Dec. 18, 1971), codified at 43 U.S.C. § 1611(c) (1988), and P.L. 94-204, § 12(b), 89 Stat. 1145, 1151, as amended, 43 U.S.C. § 1611 note (1988).

The land at issue is an irregularly shaped parcel located in the south halves of secs. 15, 16, and 17, T. 1 N., R. 1 W., Fairbanks Meridian, approximately 4 miles from downtown Fairbanks. The portions within secs. 15 and 16 were originally part of a withdrawal made by Executive Order Nos. 5352 (May 23, 1930) for the Department of Agriculture. In 1953 the withdrawal was revoked and the land was withdrawn for use by the Air Force. Public Land Order No. (PLO) 882, 18 FR 776 (Feb. 6, 1953). Sec. 16 was withdrawn for use by the Air Force in 1958. PLO 1760, 23 FR 9182 (July 27, 1958). In 1968 the withdrawals for the Air Force were revoked and the parcel was withdrawn for use by the Department of Commerce as a geophysical observatory. PLO 4508, 33 FR 11398 (Aug. 10, 1968).

CIRI's selection application was filed pursuant to an agreement reached by CIRI, the Department, and the State of Alaska intended to resolve problems with the lands available for selection by CIRI. See Seldovia Native Association, 113 IBLA 218, 220 (1990). The agreement was set forth in a document titled "Terms and Conditions for Land Consolidation and Management in the Cook Inlet Area" [hereinafter, "Terms and Conditions"]. Paragraph I.C.(2)(a) provided:

The Secretary, in conjunction with the General Services Administrator, shall promptly identify and take the necessary steps by January 15, 1978, to create a selection pool which shall consist of all the following lands, within the exterior boundaries of the Cook Inlet Region, now in existence or hereafter coming into existence by January 15, 1978: *

* *

H.R. Rep. No. 729, 94th Cong., 1st Sess. 40, reprinted in 1975 U.S. Code Cong. & Admin. News 2376, 2406. The agreement did not identify the specific lands to be included in the selection pool but described six categories of lands: (1) abandoned or unperfected public land entries, (2) Federal surplus property, (3) revoked Federal reserves, (4) cancelled or revoked powersite reserves, (5) public lands created by the reduction of Federal installations as defined in section 3(e) of ANCSA, and (6) other Federal lands as agreed to by the parties, including lands withdrawn under section 17(d)(1) of ANCSA and not withdrawn for any other purpose. Id., 1975 U.S. Code Cong. & Admin. News at 2406-07. In addition, the agreement provided that, with the concurrence of CIRI, the State, and any affected Native corporation, "the Secretary may, in his discretion, contribute to such pool properties of one or more of the foregoing categories from without the boundaries of the Cook Inlet Region * * *." Id., 1975 U.S. Code Cong. & Admin. News at 2407 (emphasis supplied).

In 1976, as part of legislation amending ANCSA, Congress required the Secretary of the Interior "to make the following conveyances to the Region [CIRI], in accordance with the specific terms, conditions, procedures, covenants, reservations, and other restrictions" in the Terms and Conditions and ratified the document "as to the duties and obligations of the United States and the Region, as a matter of Federal law." P.L. 94-204, § 12(b), 89 Stat. 1145, 1151. Among the required conveyances listed in subsection 12(b) of the legislation was, similar to subsection I.C.(2)(a) of the Terms and Conditions, "title to lands selected by the Region from a pool which shall be established by the Secretary and the Administrator of General Services." Id. The Terms and Conditions were subsequently modified, but no significant change was made to the portion establishing the selection pool. 122 Cong. Rec. 28817, 28819 (Sept. 1, 1976). Congress amended its ratification of the Terms and Conditions to refer to the modified version. P.L. 94-456, § 3, 90 Stat. 1934, 1935 (Oct. 4, 1976).

Subsequently, Congress amended subsection 12(b) several times to allow extensions of the January 15, 1978, deadline. P.L. 95-178, § 3(a), 91 Stat. 1369 (Nov. 15, 1977); P.L. 96-55, § 2, 93 Stat. 386 (Aug. 14, 1979); P.L. 96-311, 94 Stat. 947 (July 17, 1980). In the Alaska National Interest Lands Conservation Act Congress amended the subsection to create for CIRI a surplus property account as a means of satisfying CIRI's entitlement. P.L. 96-487, § 1435, 94 Stat. 2371, 2545 (Dec. 2, 1980). Congress established additional procedures for identifying lands and again extended the deadline in the Alaska Railroad Transfer Act of 1982. P.L. 97-468, Title IV, § 606(d), 96 Stat. 2543, 2556, 2566 (1982).

After the National Oceanic and Atmospheric Administration, as custodian of the Bender Mountain parcel, filed a notice of intent to relinquish it, BLM notified the State of Alaska that the Secretary was considering placing the parcel in the selection pool. State of Alaska, 106 IBLA 160, 166 (1988). As was its right, the State filed an objection based on its desire to obtain the land for transfer to the Fairbanks North Star Borough for use as a park and for other public purposes (Statement of Reasons, Exh. 5). By a decision dated April 16, 1986, BLM denied the State's objection as to 600 acres of the Bender Mountain parcel and granted its objection as to

200 acres. State of Alaska, supra at 167. The remaining 10 acres appear to have been excluded from the decision because they contain improvements and concurrence of the General Service Administration to transfer the land had not been received. Id. at 167 n.4; SOR, Exh. 12.

Both the State and CIRI appealed BLM's decision. While the appeals were pending, CIRI and the State reached a partial settlement (CIRI Motion to Dismiss, Exh. A) based on a memorandum of understanding between CIRI and the Fairbanks North Star Borough (CIRI Motion to Dismiss, Exh. F). Under the agreement, 470 acres would be conveyed to the State and CIRI would receive 327.5 acres. The Board dismissed the State's appeal as to all but the remaining 2.5 acres and dismissed CIRI's appeal in its entirety. State of Alaska, supra at 168.

On November 12, 1986, after the appeals had been dismissed, CIRI filed the selection application for 327.5 acres which is the subject of the present appeal. BLM issued its decision to convey the acreage to CIRI and appellant filed a timely notice of appeal. Appellant requested and received several extensions of time to file an SOR. On December 16, 1988, during the period granted by the extensions, CIRI filed a motion to dismiss the appeal for lack of standing. On January 3, 1989, BLM filed a response to appellant's notice of appeal in support of CIRI's motion.

On March 2, 1989, appellant filed an SOR responding to CIRI's and BLM's arguments as to standing and presenting five reasons BLM's procedures leading to the decision to convey the land violated legal requirements. In brief, appellant contends: (1) the appraisal of the land is invalid because the figure negotiated by the Department and CIRI is not supported by the record and is less than the going rate for land in the area (SOR at 6-7); (2) BLM improperly refused to accept a Recreation and Public Purpose Act (43 U.S.C. § 869 (1988)) application for the land (SOR at 7-9); (3) BLM improperly refused to consider alternative dispositions of the land (SOR at 9-12); (4) BLM incorrectly concluded that neither an environmental impact statement nor an environmental assessment was required to revoke the withdrawal of the land (SOR at 12-15); and (5) BLM abused its discretion in not attending a State sponsored public meeting concerning potential use of the land as a park (SOR at 15-16).

Both CIRI and BLM have filed responses to appellant's SOR. Appellant has filed a reply to their responses and they have filed answers to his reply. The filings have been accompanied by affidavits and numerous documents supporting the arguments and claims made by the parties. The last document filed is a letter from appellant to Dennis J. Hopewell, Esq., who represents BLM on appeal. It discusses BLM's answer to appellant's reply and, in particular, a declaration filed in support of the answer.

Prior to addressing any matters concerning the merits of BLM's decision, we must consider the arguments that the appeal should be dismissed. CIRI presents two arguments. First, it contends that appellant failed to comply with 43 CFR 4.412(b) which requires a party appealing a decision relating to land selections under ANCSA to "file with the Board a statement of facts upon which the appellant relies for standing under

§ 4.410(b) within 30 days after filing of the notice of appeal." The consequence of such failure, CIRI notes, is that an appeal becomes subject to summary dismissal under 43 CFR 4.402(d). See also 43 CFR 4.412(c). Second, CIRI argues that appellant cannot meet the standing requirement of 43 CFR 4.410(b). That subsection provides that "[f]or decisions rendered by Departmental officials relating to land selections under the Alaska Native Claims Settlement Act, as amended, any party who claims a property interest in land affected by the decision * * * shall have a right to appeal to the Board." 43 CFR 4.410(b). CIRI argues that, due to the withdrawal of the land, neither Perkins nor the Skyline Ridge Park Committee can claim a property interest in the Bender Mountain parcel.

Appellant responds:

The relevant standard for determining standing is not whether I actually own an "interest" in the land which is being trans-ferred, but whether I can claim a property interest in land which is affected by the decision. 43 CFR 4.410(b). This can include land which is not the subject of the transfer, but which the transfer might affect. Walt Hanni, [6 ANCAB 307,] 89 I.D. 14, 21-22 (1982). Since my land will in fact be affected by the transfer, I have standing to make this appeal. I also represent some other members of Skyline Ridge Park Committee, who also have property affected by the decision. [Emphasis in original.]

(SOR at 4; see Reply at 1-2.) In a supporting affidavit appellant states that his property is less than a quarter of a mile from the Bender Mountain parcel (SOR, Exh. 1). He contends that the conveyance to CIRI will affect his property in a variety of ways: (1) the low appraisal value could affect the value of his property if used as a comparable in appraising his land; (2) "CIRI's planned development" will alter the recreational amenities of the area, "affecting the marketability of my house and my land"; (3) because there is no water table, "the additional development contemplated by CIRI could well have negative impacts on the quality and availability of water at my house" which has a 270-foot deep well located downslope from the proposed conveyance; and (4) "I live where I do because of the availability of Bender Mountain as a recreation area" for hiking and skiing and "my use and enjoyment of my own property is inextricably tied up with the availability of Bender Mountain for recreation" (SOR at 5-6 (emphasis in original)).

[1] CIRI's first argument is correct. Conveyances made pursuant to the ratified Terms and Conditions are conveyances under ANCSA. P.L. 94-204, § 12(c), 89 Stat. 1145, 1152. A party filing a notice of appeal of a decision to convey land under ANCSA is required to file a statement of standing within 30 days of filing a notice of appeal. 43 CFR 4.412(b). Appellant did not do so. The appeal is subject to summary dismissal. 43 CFR 4.402(d), 4.412(c). Discretion to dismiss an appeal for failure to timely file a statement of standing, however, will not be exercised when the property interest on which a party claims standing is identified in the SOR and there is no showing that the procedural deficiency has prejudiced an adverse party. See 43 CFR 4.412(b); Red Thunder, Inc., 117 IBLA 167, 172, 97 I.D. 263, 266 (1990); James C. Mackey, 114 IBLA 308, 312-13 (1990);

Appeal of the State of Alaska, 2 ANCAB 1, 33, 84 I.D. 349, 362 (1977). CIRI and BLM have responded to appellant's arguments as to standing (CIRI Answer at 6-10; BLM Answer at 10-13). We fail to find that they have been prejudiced by appellant's failure to timely file a statement of standing and therefore decline to dismiss the appeal on that basis.

CIRI and BLM also argue that appellant lacks standing to appeal because he does not and cannot claim "a property interest in land affected by the decision." 43 CFR 4.410(b). As quoted above, appellant asserts that he does own such an interest. The difference between the parties lies in their readings of the regulation. CIRI and BLM contend that appellant has not and cannot show any interest in the land to be conveyed to CIRI under the decision (BLM Response to Notice of Appeal at 2). They understand "land affected by the decision" to mean the land to be conveyed to CIRI. Appellant contends that his property near the Bender Mountain parcel is "land affected by the decision."

[2] Although numerous rulings on standing under the provision have been issued by the Alaska Native Claims Appeal Board (ANCAB) and this Board, the ambiguity in its wording has not been previously addressed. Nevertheless, we conclude that interpretation of the provision has been foreclosed by prior decisions. ANCAB consistently understood "land affected by the decision" to mean the land described in a decision. It dismissed the

Appeal of Chickaloon Moose Creek Native Assn., 4 ANCAB 134, 144 (1980), as to 42 sections of land to be conveyed to CIRI for reconveyance to other villages because Chickaloon had not selected the land and its selection of adjacent lands "is not grounds for a claim of property interest in land selected by the other two villages." See also Appeal of Morpac, 3 ANCAB 89, 94 (1978). Of relevance to the present appeal, in City of Homer, 6 ANCAB 203, 211, 88 I.D. 1047, 1051 (1981), ANCAB held that, because the city had no claim to a 15.63-acre parcel within the city limits which had been placed in the pool created under subsection I.C.(a) of the Terms and Conditions, it lacked standing to appeal a decision to convey the land to CIRI. See also State of Alaska, 3 ANCAB 196, 209, 86 I.D. 225, 230 (1979).

Walt Hanni, *supra*, cited by appellant does provide a different rule, but it applies to a different matter. In Joseph C. Manga, 5 ANCAB 224, 239-40, 88 I.D. 460, 467 (1981), ANCAB determined that "there are fundamental legal differences between the effect of a decision to convey title and the effect of a decision to reserve a public easement" under subsection 17(b)(1) of ANCSA (P.L. 92-203, 85 Stat. 688, 708 (1971)) and that "a decision to convey land and a decision to reserve an easement across land affect property differently." Consequently, ANCAB held that an "application of the standing test in 43 CFR 4.902 [1]/ must take into account the section of the Act relied upon in the decision under appeal." *Id.* at 240, 88 I.D. at 467. In particular, ANCAB concluded that:

1/ After ANCAB was abolished and its jurisdiction delegated to the Board of Land Appeals by Secretarial Order No. 3078, 43 CFR 4.902 was repromulgated as 43 CFR 4.410(b). 47 FR 26390, 26392 (June 18, 1982).

Since the purpose of a § 17(b)(1) public easement is to provide access across Native lands to lands not selected, * * * a § 17(b)(1) easement necessarily affects lands other than those to be conveyed. Therefore, a member of the public who claims a private interest in land other than the land to be conveyed, in asserting standing to appeal a § 17(b)(1) easement decision, may rely on this private holding as his or her "property interest" affected within the meaning of 43 CFR 4.902.

Id. at 241-42, 88 I.D. at 467-68. This rule was applied in numerous decisions concerning easements, including Walt Hanni, supra at 332-35, 89 I.D. at 23-25. See Ervin K. Terry, 7 ANCAB 63, 89 I.D. 242 (1982); Ray DeVilbiss, 6 ANCAB 290, 89 I.D. 9 (1982); Patrick J. Bliss, 6 ANCAB 181, 88 I.D. 1039 (1981); Patricia & William Nordmark, 6 ANCAB 157, 88 I.D. 1028 (1981); Joseph C. Manga, 5 ANCAB 343 (1981).

Decisions by the Board of Land Appeals reflect the same understanding of 43 CFR 4.410(b). Frances A. Kibble, 100 IBLA 261, 264-65 (1987); City of Tanana, 98 IBLA 378, 380 (1987); U.S. Fish & Wildlife Service, 97 IBLA 367, 372-73 (1987); Sierra Club, Alaska Chapter, 79 IBLA 112, 115 (1984); State of Alaska, 78 IBLA 390 (1984); Henry W. Waterfield, 77 IBLA 270, 271-72 (1983); Circle Civic Community Association, 67 IBLA 376, 378 (1982). We find no reason to overrule the clear and consistent reading of the provision established by the prior decisions.

Appellant has not asserted that he holds a property interest in the lands affected by the decision. Accordingly, his appeal must be dismissed in so far as he seeks to overturn BLM's decision to convey the land to CIRI. We need not decide whether appellant has standing to appeal the portion of the decision which reserves easements. None of appellant's five arguments described above are directed toward challenging the easements identified in the decision or establishing a need to include an additional easement.

The only related matter appellant raises concerns an equestrian trail which is also used for other recreational purposes. He states that "[a] 25' ROW [right-of-way] through a subdivision is entirely different than the current trail through woods" (SOR at 6). This equestrian trail was addressed in the memorandum of understanding between the Fairbanks North Star Borough and CIRI leading to the partial dismissal of the appeals in State of Alaska, 106 IBLA 160, 166 (1988). The agreement requires CIRI to establish "by covenant, a green belt buffer strip extending forty (40) feet on either side of the existing twenty (20) foot equestrian trail, right of way number F-82022" and to "dedicate to the Borough any rights it may have in the property on which the existing equestrian trail easement lies, so that an equestrian trail easement shall exist in perpetuity upon the expiration of the existing easement" (CIRI Motion to Dismiss, Exh. F at 3). BLM's decision does not reserve such an easement but identifies right-of-way No. F-82022 as a valid existing right to which the conveyance is subject. This is consistent with the memorandum of understanding which requires CIRI to undertake actions to establish the buffer strip and dedicate rights to the Fairbanks North Star Borough rather than requiring the United States to

reserve an easement (see also CIRI Motion to Dismiss, Exh. B at 5). Thus, appellant's argument does not concern an easement.

[3] Finally, appellant has asserted that he represents the Skyline Ridge Park Committee as well as four individuals who are members of the committee and, as attested to by affidavits, own residences near or adjoining the Bender Mountain parcel (SOR, Exh. 7). Practice before the Board of Land Appeals is controlled by 43 CFR 1.3. See 43 CFR 4.3(a), 1812.1-1. In addition to representation by an attorney, 43 CFR 1.3(b) lists a number of circumstances in which persons who are not attorneys may appear. An appeal brought by a person who does not qualify to practice under one of the provisions is subject to dismissal. Leonard J. Olheiser, 106 IBLA 214, 215 (1988); Robert G. Young, 87 IBLA 249, 250 (1985); Ganawas Corp., 85 IBLA 250 (1985). The person filing an appeal has the responsibility of showing that he is qualified under the regulation. Resource Associates of Alaska, 114 IBLA 216, 218-19 (1990).

There is no provision of 43 CFR 1.3(b) which allows appellant to represent other individual land owners. Although he may represent the Skyline Ridge Park Committee as an association of citizens (43 CFR 1.3(b)(3)(vii)), there is no indication in the record that he is authorized to do so. Assuming that he is, however, does not change the outcome of the appeal. There has been no showing that the Skyline Ridge Park Committee owns an "interest in land affected by the decision." 43 CFR 4.410(b). Consequently, its appeal must be dismissed for lack of standing. 43 CFR 4.402(d), 4.412(c).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

John H. Kelly
Administrative Judge

I concur:

James L. Byrnes
Administrative Judge

